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No. 558

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

[illegible] *Petitioner*,

vs.

SOUTHERN RAILWAY COMPANY, *Respondent*.

[illegible]

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 889

HENRY HAROLD HOGUE, *Petitioner,*

v.

SOUTHERN RAILWAY COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Georgia Court of Appeals is reported at 116 Ga. App. 194, 156 S.E. 2d 412 and is printed at pages 13-16 of Appendix B of the petition. The memorandum order of the Superior Court of Fulton County, Georgia, which is printed at page 11 of Appendix A of the petition, is not reported.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on June 28, 1967 (R. 142). A petition for a writ of certiorari to the Georgia Supreme Court was

denied on September 7, 1967 (R. 153). The petition for certiorari was filed on December 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

Where the defendant in an action under the Federal Employers' Liability Act relies on a release by the employee, can the employee challenge the validity of the release on the ground of mutual mistake of fact without first tendering the amount paid him pursuant to the release?

STATUTES INVOLVED

Sections 1 and 5 of the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 65, as amended, 45 U.S.C. Secs. 51, 55) are set forth in Appendix C of the petition, pages 18-19.

STATEMENT

Petitioner's action was brought in the Superior Court of Fulton County, Georgia, under the Federal Employers' Liability Act (Act of April 22, 1908, 35 Stat. 65, as amended, 45 U.S.C. Secs. 51 *et seq.*) to recover for an injury allegedly sustained in the course of his employment by respondent (R. 5). Respondent, by a plea in bar, demurrer and answer, set forth a release signed by petitioner for consideration and given to respondent (R. 27, 34, 39, 108, 118). Petitioner, in turn, amended his complaint to answer respondent's pleadings, and alleged that the release was obtained by reason of mutual mistake of fact as to petitioner's injury, both parties relying on the assurance of respondent's doctor that the injury was only a bruised knee, whereas it was later determined that the injury was

permanent and more serious (R. 47, 52, 90, 110). Respondent then filed demurrers to the amended complaint, and asserted that petitioner was not entitled to attack the release on the ground of mutual mistake without a tender of the consideration which he had received when the release was signed, while pointing out that no such tender had been made.

The Superior Court overruled respondent's demurrer and denied its motion for a summary judgment (R. 119, 120; Pet. App. A, pp. 11, 12). On appeal, the Georgia Court of Appeals reversed the judgment, concluding that Federal law respecting the necessity of a tender did not differ from the law of Georgia. Thus, the court held that under the facts alleged the release could not be attacked without tender of the consideration (R. 135, 142; Pet. App. B, pp. 13-16). Petitioner's application for a writ of certiorari to the Supreme Court of Georgia was denied, without opinion (R. 153).

REASONS FOR DENYING THE WRIT

This proceeding involves the obligation of a plaintiff suing under the Federal Employers' Liability Act to tender a return of the consideration which he received for a release when he seeks to avoid that release on the ground of a mutual mistake of fact. It is significant, in view of the authorities discussed below, that petitioner asserts that the case involves a different issue—whether such a tender must be made when the release is attacked on the grounds of fraud. In his first "Question Presented" (pp. 2-3), petitioner would have it appear that his attack on the release in this case was "on the ground of mutual mistake of fact and fraud." In fact, no charge of fraud is made in his amended complaint.

On the question which this proceeding *does* present, both Federal and State courts applying the Federal Employers' Liability Act have recognized that where a plaintiff seeks to avoid a release on grounds such as that which petitioner claims in his amended complaint in this proceeding, he must make a tender of the consideration he received when the release was executed. The Ninth Circuit Court of Appeals has stated, in a case arising under the Act, that "Except where fraud enters into the execution of a release, rescission must be timely and a tender of the consideration received for the release must be made." *Graham* v. *Atchison, T. & S.F. Ry.*, 176 F.2d 819, 826 (1949). To the same effect are the cases brought under the Act in the State courts. *Central of Ga. Ry.* v. *Ramsey*, 275 Ala. 7, 151 So. 2d 725 (1962); *Allison* v. *Chicago G. West. Ry.*, 240 Minn. 547, 62 N.W. 2d 374 (1954); *Squire* v. *Wheeling & Lake Erie Ry.*, 91 Ohio App. 507, 108 N.E. 2d 846 (1950), *rev'd on other grounds*, 155 Ohio St. 201, 98 N.E. 2d 313 (1951), *rev'd*, 342 U.S. 935; *Union Pac. R.R.* v. *Zimmer*, 87 Cal. App. 2d 524, 197 P.2d 363 (1948). *Cf Seymour* v. *Chicago & N.W. Ry.*, 181 Iowa 218, 164 N.W. 352, 358 (1917).*

Petitioner cites no case to the contrary. He relies instead solely on cases in which the releases were attacked on the grounds of fraud. Thus, the "direct conflict" which petitioner sees between the present case and other decisions under the Act is wholly illusory.

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* Since petitioner made no allegation that his financial circumstances prevented a tender of the consideration, he is not able to avoid the rule of these cases by invoking the exception sometimes recognized in such circumstances. See Rase v. Minneapolis, St. P. & S. M. Ry., 118 Minn. 437, 137 N.W. 176 (1912).

The distinction between fraud and mistake cases is a reasonable one. Where the attack on the release is based on mutual mistake of fact, the defendant is not alleged to be culpable in any way. On the other hand, where the defendant is charged with fraud, his demand for a return of the consideration can be rejected as an attempt to prevent a review of his own improper or unconscionable conduct. Moreover, a rule requiring return of the consideration in fraud cases can be disapproved as encouraging fraud upon employees protected by the Act. But good faith mistake of fact by its very nature cannot be fostered by such a rule; the employer-defendant in such cases does not contemplate that the release will operate as anything other than a fair means of compensation.

This distinction in the cases under the Act follows a similar distinction which has been recognized in common law cases. Courts have frequently held that when a release was challenged as void because of actual fraud, no return of the consideration would be necessary prior to suit, whereas if it were challenged as only voidable due to, for example, constructive fraud or mutual mistake of fact, the return of the consideration received would be a precondition to suit. *Pacific Greyhound Lines* v. *Zane,* 160 F. 2d 731, 735-36 (9th Cir. 1947) (applying California law); *McCarty* v. *Kendall Co.,* 242 F. Supp. 495 (W.D. S.C. 1965) (applying South Carolina law); *Watson* v. *Bugg,* 365 Mo. 191, 280 S.W. 2d 67, 69 (1955); *Picklesimer* v. *Baltimore & O. R.R.,* 151 Ohio St. 1, 84 N.E. 2d 214 (1949); *In re Clark's Estate,* 318 Mich. 92, 27 N.W. 2d 509 (1947); *Bonacci* v. *Massachusetts Bonding & Ins. Co.,* 58 Cal. App. 2d 657, 137 P. 2d 487, 491 (1943); *Frehe* v. *Schildwachter,* 289 N.Y. 250, 45 N.E. 2d 427 (1942);

Swan v. *Great No. Ry.*, 40 N.D. 258, 168 N.W. 657, 660-61 (1918).

Petitioner attempts to avoid the weakness of his position by assertions (*e.g.*, Pet., pp. 5, 7, 8) that the court below decided the question under Georgia law. The opinion of that court, however, clearly reveals the insubstantial nature of this charge: "The question posed in the present case is controlled by federal law" (Pet., p. 15).

Finally, petitioner apparently suggests, by his citation of *Duncan* v. *Thompson*, 315 U.S. 1, and *Philadelphia, B. & W. R. Co.* v. *Schubert*, 224 U.S. 603, that Section 5 of the Federal Employers' Liability Act (45 U.S.C., Sec. 55) makes releases improper, or at least suspect. Neither case, however, involved a post-injury release for consideration. Moreover, this Court in subsequent cases has made it clear that "a release is not a device to exempt from liability [within the meaning of Section 5] but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversies exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation." *Callen* v. *Pennsylvania R.R.*, 332 U.S. 625, 631. See also *Dice* v. *Akron, C. & Y. R.R.*, 342 U.S. 359.

CONCLUSION

Petitioner has failed to establish that there is any conflict of decisions on the issue presented in this case. The consistent decisions of both Federal and State courts on that issue indicate that there is no need for a decision by this Court to aid in the proper administration of the Federal Employers' Liability Act. The

petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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